

Treaty Establishing the European Defense Community

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## TREATY ESTABLISHING THE EUROPEAN DEFENSE COMMUNITY

The Treaty Establishing the European Defense Community (EDC)<sup>1</sup> is a defensive treaty of regional collective security.<sup>2</sup> But this content is not its *raison d'être*. The treaty owes its origin to the necessity, proclaimed by the American Secretary of State, of rearming Western Germany in order to bolster the defense of "Free Europe" with German divisions, a move held indispensable by military leaders.<sup>3</sup> This aim could have been accomplished by allowing Western Germany to rearm and by including a rearmed Western Germany directly in the North Atlantic Treaty Organization (NATO). It is the recognition of this necessity by France, coupled with her deep-seated aversion against the rearmament of Germany, which produced the Pleven Plan, finally elaborated into the European Defense Community Treaty. Although the Pleven Plan was originally rather skeptically looked at in the United States, especially from the point of view of its military effectiveness, French diplomacy succeeded in convincing the United States that this is the only feasible and acceptable way of rearming Western Germany. Just as the Schuman Plan should guard against the economic possibility of Germany's making war again, thus the Pleven Plan is designed to prevent the military possibility of Germany's making war again. And in both cases the means to achieve this end is supranational organization. True, the French had to make concessions, as compared with the Pleven Plan. But the EDC Treaty prevents, at least, from a French point of view, the re-creation of a German national army and a German general staff, limits the number of German troops, prevents the production of heavy and atomic war matériel by Western Germany.

<sup>1</sup> The treaty consists of 132 articles and annexes; among them the Military, Financial and Jurisdictional Protocols, the protocols concerning the relations between the European Defense Community and the North Atlantic Treaty Organization, and the Convention relating to the Status of European Defense Forces. To that have to be added the Protocol to the North Atlantic Treaty, the Treaty between the United Kingdom and the member states of the EDC, and the Tripartite Declaration of the three Western Foreign Ministers; all instruments were signed at Paris on May 27, 1952.

The treaty is in a single original in French: *Traité instituant la Communauté Européenne de Défense*. Although the Council shall establish authentic texts in the languages other than that of the original, in case of discrepancies the original in French shall govern (Art. 130). English text in: 82d Cong., 2d Sess., Senate Execs. Q & R (June 2, 1952, Washington), pp. 167-254. See also Hearings before the Committee on Foreign Relations, U. S. Senate, 82d Cong., 2d Sess., on Execs. Q & R (Washington, 1952, 267 pp.), and the Report of that Committee (Exec. Report No. 16, Washington, 1952, 58 pp.).

On the European Defense Community Treaty, see C. G. Fenwick in this JOURNAL, Vol. 46 (1952), pp. 698-700; Jacques Trempont, "*La Communauté Européenne de Défense*," in *International and Comparative Law Quarterly*, London, Vol. I, Pt. 4 (October, 1952), pp. 519-532.

<sup>2</sup> Article 2.

<sup>3</sup> In view of Western Germany's industrial capacity (Gen. Collins, Hearings, p. 135) and the fact that the Germans are "able fighters" (Gen. Collins, *ibid.*, p. 125).

Naturally the Pleven Plan, which had to be produced quickly, took the already existing Schuman Plan as a model. In doing so, a second leading idea appeared, to make the European Defense Community a new and essential step toward the formation of a united Europe, restricted, in view of British and Scandinavian unwillingness to enter a supra-national organization, to the six countries of the Schuman Plan.

It is from this genesis and these motives that the EDC Treaty has to be understood. They explain that the treaty is not self-contained. It is strongly related to the "Contractual Agreements" with Bonn.<sup>4</sup> In contrast to the European Coal and Steel Community, the European Defense Community from the beginning is not autonomous, but forms a part of NATO.<sup>5</sup> The NATO Supreme Commander is empowered to satisfy himself that the European Defense Forces are organized, equipped, trained and prepared for use in a satisfactory manner; as soon as they are ready for use, they are at the disposal of the Supreme NATO Commander; they shall receive technical directives from the appropriate bodies of NATO; during wartime the Supreme NATO Commander shall exercise with respect to the European Defense Forces the full powers and responsibilities of Supreme Commander.<sup>6</sup> The Commissariat depends, in certain aspects, on NATO; there are many interrelations with NATO.<sup>7</sup> It is because of this close association that the Protocol to the North Atlantic Treaty extends the guarantees of Article 5 to all the member states of the European Defense Community, *i.e.*, to the Federal Republic of Germany which alone is not a member of NATO. The Convention between the United Kingdom and the European Defense Community extends the guarantees of Article IV of the Brussels Treaty of March 17, 1948, to the Defense Community states, *i.e.*, to the Federal Republic of Germany and Italy.

Last, not least, the European Defense Community Treaty is linked with the Treaty Establishing the European Coal and Steel Community. The latter served as a model; both treaties are concluded for fifty years;<sup>8</sup> the norms concerning juridical personality<sup>9</sup> and privileges and immunities<sup>10</sup> are identical; both treaties contain an "accession" clause for "any European State."<sup>11</sup> Whereas the Coal and Steel Treaty creates an economic community, based on a common market, common objectives and common

<sup>4</sup> It plays a dominant rôle in the related "Financial Convention" with Bonn; its coming into force is an indispensable condition for the coming into force of the agreements with Bonn.

<sup>5</sup> European Defense Community Treaty, Art. 5. Secretary of State, in Hearings, p. 22.

<sup>6</sup> Treaty, Art. 18.

<sup>7</sup> *Ibid.*, Arts. 13, 47, 68, 69, 70, 77, 78 *bis*, 91, 94, 101, 102, 128.

<sup>8</sup> *Ibid.*, Art. 128; European Coal and Steel Treaty, Art. 97.

<sup>9</sup> Arts. 7 and 6, respectively.

<sup>10</sup> Arts. 116 and 76, respectively.

<sup>11</sup> Arts. 129 and 98, respectively. But as the "accession" is conditional upon the unanimous vote of the Council, the system is, in fact, not one of accession, but of admission.

institutions, the Defense Community Treaty creates a military community, consisting of common institutions, common armed forces and a common budget. There is a parallelism between the four organs of both communities, and two, Assembly and Court, are common to both. Both communities and organs are supra-national, but not wholly so.

To a certain extent, the supra-national character of the European Defense Community is more pronounced in the very wording of the treaty,<sup>12</sup> as well as by the fact that it provides for the elimination of national armies and for the creation of a common, supra-national, European, quasi-federal army. For, generally speaking, the member states of the Community shall not recruit or maintain armed forces, except those in the European Defense Forces.<sup>13</sup> There are exceptions; the most important one is the recruitment and maintenance of national armed forces intended for use in the non-European territories with respect to which a member state assumes defense responsibilities;<sup>14</sup> this norm applies particularly to France, but excludes German national armed forces.

The European Defense Forces<sup>15</sup> are composed of "contingents placed at the disposal of the Community by the member States with a view to their fusion." They constitute a "federal" army, an integrated force, wearing a common uniform. A "basic unit" of homogeneous nationality will correspond to something like a division of between 13,000 and 14,000 men; Germany will have twelve divisions. But they will lack logistic and other facilities. In order to reassure the French against the fear of West Germany's at some time withdrawing from the Community, the American and British Foreign Ministers laid down in the "Tripartite Declaration" that they have "an abiding interest . . . in the effectiveness of the treaty. . . . Accordingly, if any action from whatever quarter [read: West Germany] threatens the integrity or unity of the Community," they will "regard this as a threat to their own security." They will act in accordance with Article 4 of the North Atlantic Treaty, *i.e.*, consult. An international or multi-national command will be created at the army corps level. The European Defense Forces will wear a common European uniform; uniformity of discipline, equipment and training is provided. The Defense Community has, in respect of the Defense Forces and their members, the

<sup>12</sup> Already the Preamble speaks of a "supra-national organization" and of the "formation of a United Europe," whereas the Preamble of the Coal and Steel Treaty speaks only of "an organized and vital Europe." The supra-national character is also strongly underlined in Arts. 1 and 20, par. 2.

<sup>13</sup> European Defense Community Treaty, Art. 9.

<sup>14</sup> Art. 10, pars. 1, 4. But "The total volume of national armed forces . . . shall not be so great as to compromise participation of each member State in the European Defense Forces" (Art. 10, par. 5). Art. 13, particularly attacked in France in view of the Indo-China war, makes the withdrawal of troops from the European Defense Forces in case of a serious emergency affecting a non-European territory dependent on the agreement of the Supreme NATO Commander.

<sup>15</sup> European Defense Community Treaty, Arts. 9-18, 68-79, and Military Protocol.

same rights and obligations as the states in respect of their national forces and members.<sup>16</sup> Members of the European Defense Forces have the duty of loyalty to the Community, of obedience to its laws and regulations, and of obedience to the European military leaders, regardless of nationality.<sup>17</sup> The incorporation of units in the European Defense Forces shall be marked by a solemn demonstration of allegiance to the Community.<sup>18</sup> The Defense Forces will observe the laws of war.<sup>19</sup>

Of the four organs, three are supra-national in character, although not wholly so. Little has to be said of the two organs common to both communities. The Assembly<sup>20</sup> is the Assembly of the Coal and Steel Community, but complemented by three more delegates each from France, West Germany and Italy; it consists, therefore, of eighty-seven delegates. Its competence is limited; it can only discuss the general report of the Commissariat, formulate comments and express its wishes and suggestions; it has a competence in respect of the common budget, submitted to it; it may even propose the rejection of the entire budget.<sup>21</sup> It can by a motion of censure, adopted by a two-thirds majority, force the resignation of the Commissariat in a body. It has, finally, a vast competence under Article 38 of the treaty.

The Court<sup>22</sup> is the Court of Justice of the European Coal and Steel Community, supra-national as to its function, but not as to its creation. There is here a highly interesting novelty: According to Article 53, the Court shall be assisted by a judicial system including, particularly, subordinate courts which shall be European in character.

The Commissariat,<sup>23</sup> like the High Authority, is not supra-national as to its creation. Contrary to the creation of the High Authority, all nine members of the Commissariat are appointed by the governments of the member states by agreement among themselves; equally the governments by agreement appoint the President of the Commissariat.

The Commissariat, like the High Authority, is supra-national as to function. But there is here a fundamental and far-reaching difference. Whereas the High Authority is "responsible for assuring the fulfillment of the purposes of the treaty," is a policy-making organ, the Commissariat is merely a supra-national executive organ. In certain respects it depends not only on NATO, but in certain respects action lies directly with the governments;<sup>24</sup> in other respects it is dependent on agreement between member states;<sup>25</sup> in certain matters the preparation of drafts, or even their

<sup>16</sup> *Ibid.*, Art. 80.

<sup>17</sup> Military Protocol, Art. 16.

<sup>18</sup> *Ibid.*, Art. 17.

<sup>19</sup> European Defense Community Treaty, Art. 80.

<sup>20</sup> *Ibid.*, Arts. 33-38.

<sup>21</sup> *Ibid.*, Art. 87, par. 3.

<sup>22</sup> *Ibid.*, Arts. 51-67.

<sup>23</sup> *Ibid.*, Arts. 19-31.

<sup>24</sup> *E.g.*, recruitment of basic units (Art. 73); decision to proceed with mobilization (Art. 75).

<sup>25</sup> Thus as to the single general regulations concerning military discipline of the European Defense Forces (Art. 79).

execution, has to be made in consultation with the governments of the member states. The Commissariat, contrary to the High Authority, has no competence to procure the funds necessary for the accomplishment of its mission; it has no taxing power. True, the Commissariat, like the High Authority, can take decisions binding in all details, make recommendations binding only with respect to the specified objectives, and lastly, give non-binding opinions. But it can take those actions only in execution of a policy it has not determined itself.

The second fundamental difference in the European Defense Community Treaty is that the principal, the directing organ, is the Council<sup>26</sup> which, of course, is, both as to creation and function, an "international," intergovernmental organ, where the sovereignty of the member states fully reappears, especially in the many cases where the unanimous action of the Council is required. This finds expression in the Council's competence to issue directives for the action of the Commissariat and in the necessity for the Commissariat, in many cases, to obtain the concurrence or approval of the Council. The Council acts, as the case may be, by simple majority,<sup>27</sup> by a qualified majority, or unanimously. In many respects unanimity is required.<sup>28</sup> The Commissariat establishes the plan for the organization of the Defense Forces with the unanimous concurrence of the Council.<sup>29</sup> The Commissariat directs the training and preparation of the Defense Forces on the basis of a common doctrine and uniform methods, drawn up in co-operation with NATO and according to its directives;<sup>30</sup> it directs the military training schools of the Community; it administers personnel and matériel.<sup>31</sup> The uniformity of the period of active duty of the Defense Forces needs the unanimous decision of the Council.<sup>32</sup>

As to the common budget,<sup>33</sup> the Commissariat, in consultation with the governments, prepares and submits it to the Council; the Council must approve it before it is sent to the Assembly. The Council appoints, by unanimous vote, the Financial Comptroller, who is independent of the Commissariat and responsible to the Council; he supervises the execution of the budget. The Council, equally by unanimous vote, determines the number of members of the Accounts Commission, an independent collegial authority, and appoints its members and its President by a two-thirds vote.<sup>34</sup> The Commissariat prepares,<sup>35</sup> in consultation with the governments,

<sup>26</sup> Treaty, Arts. 39-50.

<sup>27</sup> "Unless otherwise provided in the present treaty" (Art. 39, par. 4).

<sup>28</sup> Thus, under Arts. 20, par. 1; 23; 31; 39, par. 1; 44; 48; 68, par. 2; 77, par. 1; 105; 123, par. 1; 129.

<sup>29</sup> Art. 71.

<sup>30</sup> Art. 74; Military Protocol, Art. 26.

<sup>31</sup> Art. 78.

<sup>32</sup> Art. 72, par. 2.

<sup>33</sup> European Defense Community Treaty, Arts. 83-100 and Financial Protocol.

<sup>34</sup> Such qualified majority must in all cases, where required, include the votes of the representatives of the member states which together placed at the disposal of the Community at least two-thirds of the total contributions of the member states, or the votes of five member states (Art. 43, par. 2).

<sup>35</sup> Treaty, Arts. 101-111.

the common armament, equipment, supply and infra-structure program of the Defense Community;<sup>36</sup> the draft of this common plan shall be annexed to the draft budget and needs the approval of the Council. The Commissariat prepares a common program for scientific and technical research; it ensures the placing of contracts, and shall supervise their execution. The production, import and export of war matériel is prohibited, except under licenses granted by the Commissariat; the latter has to prepare by regulations the procedural rules for granting these licenses; they must be submitted to the Council and have to be approved by a two-thirds majority. But the Commissariat shall not grant licenses for heavy and atomic war matériel "in strategically exposed areas" [read: Western Germany] except by unanimous decision of the Council, *i.e.*, with the consent of France.

The pooling of national armies goes, of course, farther than the pooling of coal and steel, and concerns a particularly sensitive area of national sovereignty. Hence, the predominance of the Council. On the other hand, it can be asked here with more insistence than in the Coal and Steel Community whether a Defense Community with a common "federal" army can operate *à la longue* without a federal state, without a political authority. The answer to this question is that the European Defense Community under the treaty is purely provisional, not only because of certain details,<sup>37</sup> but in a much more basic sense. The whole Community shall remain in effect "until it is replaced by a new one, resulting from the establishment of a federal or confederal organization as provided in Article 38."<sup>38</sup>

Article 38 gives the Assembly the highly important function to prepare certain proposals and to submit them to the Council within six months after assuming functions; they will, then, be sent to the member states which, within three months of their receipt, shall call a conference for the purpose of examining them. These proposals relate: (1) to the creation of an Assembly of the European Defense Community elected on a democratic basis; (2) to the powers to be granted to said Assembly; (3) to the modification of other institutions; and (4) to the problem of co-ordinating the different organizations for European co-operation, now in being or to be created in the future, within the framework of a federal or confederal structure. This is certainly a heavy order. It must be said that a "confederal" structure seems hardly adequate, as the proposed European army is definitely of the type corresponding to a federal state.

No time was lost. The Assembly of the existing Coal and Steel Community, plus three more members each from France, West Germany and Italy, has set up a Constitutional Committee under the chairmanship of

<sup>36</sup> To aid the Commissariat in this task a Consultative Committee shall be established (Art. 109).

<sup>37</sup> *E.g.*, later direct recruitment by the Commissariat (Art. 73, par. 3).

<sup>38</sup> Treaty, Art. 8; see also Art. 75, par. 2.

the West German Heinrich von Brentano, to draft a political constitution. Naturally, there is a struggle between "federalists" and "functionalists" and there will be more of it at Strasbourg, where it is feared that a strong supra-national entity may give rise to two competing blocs within "Free Europe."

These steps, now under way, have been taken to facilitate the ratification of the Defense Community Treaty, and are, on the other hand, hampered by the present difficulties of ratification. It certainly was hoped that ratification would speedily be given, as seen from the related "Financial Convention" with Bonn, which foresees, in Articles 3 and 4, a German financial contribution for at least nine months prior to June 30, 1953. But hesitations have arisen which make it doubtful whether the treaty will have been ratified on this date, or even whether it will be ratified at all. There are many different reasons for this delay both in West Germany<sup>39</sup> and in France.<sup>40</sup>

The whole situation with regard to the European Defense Community Treaty presents a dilemma: Even if ratified, the efficiency of an European army has still to be proved. There is also the fact that perhaps European leaders and the United States are far in advance, as far as the sentiment for European Union goes, as compared with the parliaments and peoples of these six states.<sup>41</sup> On the other hand, non-ratification endangers the whole structure of the defense of the free world.

JOSEF L. KUNZ

#### THE CHARTER OF THE ORGANIZATION OF AMERICAN STATES AS THE "LAW OF THE LAND"

It is an interesting speculation as to what would have been the fate of the Charter of the Organization of American States when it came before the Senate Foreign Relations Committee in 1950, if the current controversy over the Bricker Amendment had been at the time in full swing. Doubtless the Charter would have been subjected to quite a number of reservations, all looking to the protection of Congress and of the several States against alleged encroachments upon their constitutional powers. Whether the probable reservations would have been sufficient to weaken the Charter

<sup>39</sup> Socialist opposition, the constitutional issue, anti-rearmament sentiment, fear of adverse economic repercussions and of the reaction of the Soviet Union, fear of definitely blocking the unification of the "two Germanies," irritation over the Saar issue, recent political developments in France, slowing down of NATO efforts.

<sup>40</sup> Basically fear of Germany, worry about the Indo-China war, considerations of national sovereignty, economic difficulties, lessening of the fear of Soviet aggression in Europe, wish to have first a definitive settlement of the Saar problem in favor of France, more American aid, closer association of the United Kingdom with the European Defense Community, dissatisfaction with certain clauses of the treaty (*e.g.*, Art. 13).

<sup>41</sup> Cf. M. J. Bonn, *Whither Europe? Union or Partnership?* (New York, 1952).